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OCTOBER TERM, 1892.

THE STATE OF IOWA, *Complainant*,

vs.

THE STATE OF ILLINOIS, *Defendant*.

ORIGINAL SUIT.

BRIEF AND ARGUMENT FOR DEFENDANT.

GEORGE HUNT,
*Attorney General, State of Illinois.*

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IN THE

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*May it Please the Court:*

The pleadings constitute the entire record in this cause, and the object of the proceeding is to ascertain and fix by judicial finding the boundary line between the States of Iowa and Illinois.

The boundary line between these two States is fixed by two Acts of Congress, passed at different times, and differing slightly in verbiage. These two acts must be reconciled.

1.

The Act of Congress of April 18, 1818, to enable the people of Illinois to form a Constitution and State Government, and for the admission of such State into the Union after defining the northern boundary thereof, proceeds "Thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river." (I. Star & Curt, p. 50.) The same language concerning this boundary has been preserved in the Constitutions of said State of 1818, 1848 and 1870. Id. pp. 55, 68, 99.

The Enabling Act for Iowa, passed in 1848, (5 U. S. Stat., p. 742) gives the eastern boundary of said State as follows: "Beginning at the mouth of the Des Moines river at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude," &c.

2.

Let us see if we can ascertain the proper meaning of the expression, "middle of the river," as used in this Enabling Act.

In Wheaton on International Law (3d Eng. ed.), Sec. 200, p. 297, it is said:

"By the Treaty of Peace concluded at Paris in 1763, between France, Spain and Great Britain, the Province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the French and British possessions in North America was ascertained by a line drawn throngh the *middl*

*of the river* Mississippi, from its source to the Iberville, and from thence through the latter river and the lakes of Maurepas and Pontchartrain to the sea."

The boundary line between the territories belonging respectively to Great Britain and France, as fixed by the treaty of 1763, was the middle of the Mississippi river. It needs no argument to show that an international boundary line, established by this language, would be the middle of the main channel or channel of commerce. Every consideration, both of dominion and commercial equality, would give to the language this meaning. Where the Enabling Act creating a State out of part of the territory embraced in the treaty, uses the same language to define the boundary as that used in the treaty, it will certainly receive the same construction as that given to the treaty, unless for the most obvious reasons another construction should obtain.

After the peace between the United States and Great Britain, the territory on the east of the Mississippi passed to the United States, while that on the west remained with France.

Unquestionably the boundary line remained the same. The same consideration which fixed it in the old relations would retain it in the new.

Subsequently the State of Illinois was created out of the territory on the east of this boundary line, and the State of Iowa out of that on the west.

The middle of the Mississippi river thus became the boundary between these different States. How was the dividing line to be ascertained? The same author says (Sec. 192, p. 291):

"Where a navigable river forms the boundary of con terminous States, the middle of the channel, or *thalweg*, i generally taken as the line of separation between the two States, the presumption of law being that the right of nav igation is common to both; but this presumption may b destroyed by actual proof of prior occupancy and long un disturbed possession, giving to one of the riparian propri tors the exclusive title to the entire river."

Therefore, according to this eminent author, the middl of the *channel* of the river is the boundary line. What i the *channel* of the river? Clearly, it is not the same thing as the bed of the river. Wheaton says (Sec. 202, p. 301)

"The *channel* of the Mississippi was remarkably winding crosssing and re-crossing perpetually from one side to the other of the *general bed of the river*."

The general bed of the river is the space between th two shores, but the channel of the river is the navigabl portion of the river—that part of the river suited for and usually used for the purposes of navigation. As Wheaton says, the middle of the channel or *thalweg* is taken as the line of separation between two States, because the pre sumption of law is, that the right of navigation is com mon to both. What each nation or power would insis upon was an equal right to the navigation of the river This could not be obtained if the river was divided by drawing a line between two shores unless the width of th navigable channel was coincident with the distance betwee the two shores. Each nation demands one-half of th navigable channel in whatever part of the river it is lo cated, and the States created out of the territory be longing to these nations would take the same boundaries

Wheaton also comments on what is called in the international law "innocent passage," permitted in streams and bays by the nation which has jurisdiction over the same. Such passage would be permitted for commercial purposes in times of peace, but such right is an imperfect right, as the author points out, which may be interrupted and prevented by the nation owning the navigable water.

Therefore, where the middle of the river is made the boundary, the line is drawn in the middle of the navigable channel. It is in this sense that the words are used in the treaty of 1763.

In Creasy on International Law, p. 222, Sec. 231, it is said:

"It has been stated that where a navigable river separates neighboring States, the *thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquae*, was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

In Halleck on International Law, Vol. 1, p. 145, Sec. 23, it is said:

"Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very

unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object."

Cited with approval in Wharton Digest of International Law of the United States, Vol. 1, p. 97.

While we readily admit that the right of navigation which would fix the middle of the navigable channel as the boundary between separate or alien nations, does not operate with the same force between the States of the American Union, yet the question remains, where a boundary line has been fixed between two alien powers, and the same line, described in practically the same language, becomes the boundary between two States of the American Union, will the changed political condition so affect the force of the language used as to change the boundary line?

The Enabling Act for admitting Wisconsin, passed in 1846, (9 U. S. Stat., p. 56), gives the western boundary of that State as "thence down the center of the main channel of that (Mississippi) river to the north-west corner of the State of Illinois." The north-west corner of the State of Illinois, therefore, must be in the middle of the main channel of the river; and it is down along the middle of the main channel of the river that the western boundary of Illinois runs. If the words, "in the middle of the river," in the Enabling Act of Illinois, and the words, "middle of the main channel," in the Enabling Acts for Iowa and Missouri, do not describe the same line, then it would result that there is some portion of the river which would be in none of the States,—a construction which could not be allowed.

In *Buttenuth* v. *St. Louis Bridge Co.*, 123 Ill. 535, the court says (p. 551):

"The suggestion, Congress, by its Enabling Acts, may have established one line in the Mississippi river for the eastern boundary for Missouri, and another line, farther east, for the western boundary of Illinois, has nothing, in law or in fact, upon which to rest. The whole legislation on this subject shows, as before remarked, it was the intention of Congress to make the river a 'common boundary' between these States, and the expressions used in both Enabling Acts, although the words used may not be the same, make the middle of the main channel of the permanent river the boundary line."

It will be observed that the court here says that the middle of the *main channel of the permanent river* is the boundary line. The permanent river is one thing, and the main channel of the permanent river is another thing. By the permanent river is doubtless meant the river between the permanent shores at an ordinary stage of water. If the middle of that space were the boundary line, of course the court would have said that the middle of the permanent river was the boundary line; but the court does not say that. It says that the middle of the main channel of the permanent river is the boundary line. The main channel, therefore, is not the same thing as the river from shore to shore. What then is the main channel of the river? We have seen that it is the channel which is best suited and is usually used for the purposes of navigation—the channel of commerce used by vessels in the carrying trade.

In *Dunleith & Dubuque Bridge Company* v. *The County of Bubuque*, 55 Iowa 558, the Supreme Court of Iowa had this question of the State boundary between Iowa and Illinois

before it, in a case involving the taxation of a bridge across the Mississippi river. The court in that case says that but one question was presented for its determination, and that question was, what line was indicated by the words "middle of the main channel" in the act of Congress admitting Iowa to the Union. The court says that there are two meanings to the word "channel"; one the bed over which the water flows from bank to bank, and the other the line of the deep water which vessels follow, which is the sense in which the word is familiarly used by the boatmen of the Mississippi river. The Iowa court decided that the words "main channel" in the Act of Congress meant the bed of the river from bank to bank.

The same question came before the Supreme Court of Illinois in the case *Buttenuth* v. *The St. Louis Bridge Co., supra.* The question arose in the same manner in which the question arose in the Iowa case, viz., the taxation of a bridge across the Mississippi river. The Supreme Court differs from the Supreme Court of Iowa in the case above referred to, and decides that the words, "middle of the river," do not mean a line midway of the water surface; that the words "middle of the river," and "middle of the main channel," are synonymous, and the words "main channel," as used in the Acts of Congress, mean that space within which vessels can, and usually do, pass; that this expression does not include the shallow water of the stream, which at some seasons of the year may be impossible of navigation, but it is the "channel of commerce," upon which each nation or State demands the right to move its products without any interference from the State or nation occupying the opposite shore. The court says (p. 547):

"When applied to rivers as boundaries between States, the phrases, 'middle of the river,' and 'middle of the main channel,' are equivalent expressions, and both mean the center line of the main channel,—or, as it is most frequently expressed, the 'thread of the stream.' Should the expression, 'middle of the river' be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and distant away at another. Had the boundaries of Illinois been fixed at the time of the high water in 1844, and the middle of the river opposite St. Louis be held to be a line midway of the surface of the water, that line would then have been far east of the present city of East St. Louis, and on the waters receding, it would have shifted back toward the west, nearer the city of St. Louis. So unsatisfactory a proposition as that will not be adopted. It would lead to insurmountable difficulties. Some light will be cast upon the subject of inquiry by first ascertaining, as near as may be, the meaning of the words, 'main channel,' 'mid-channel,' middle of the current,' as those terms are used in the adjudged cases and in the text-books that shall be examined.

"The definition of the word 'channel,' given in the most recent edition of Webster's Dictionary, is, 'the bed of a stream of water, especially the deeper part of a river or bay where the main current flows.' The case of *Dunleith and Dubuque Bridge Co.* v. *County of Dubuque*, 55 Iowa 558, while this court does not approve the decision of the case contains a very acurate definition of the word 'channel,' as commonly used by river men. It is, 'the word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow.' In *Rowe* v. *Smith*, 51 Conn. 256, it is said the expression, 'middle of the channel of the bay or harbor,' does not refer to the thread of deepest water, but to that space within which ships can and usually do pass.' It is apprehended it is in this sense the expressions, 'middle of the river,' 'middle of the main channel,' 'mid-channel,' 'middle thread of the channel,' are used in enabling Acts of Congress and in State constitutions es-

tablishing State boundaries. It is the free navigation of the river,—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway,'—that States demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore, the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passage to and fro for purposes of defense or commerce. That would be to surrender all, or at least the most valuable part of such river boundary, for the purposes of commerce or other purposes deemed of great value to independent States or nations."

The court then cites certain cases as illustrative of this point, and, after deciding that the middle of the main channel of the permanent river is the boundary line, as we have quoted above, proceeds (p. 551):

"In such cases the principle is as stated by Mr. Woolsey, in his work on International Law, Sec. 58: 'Where a navigable river forms the boundary between States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of parties.' Commercial considerations make it imperative, where States or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. That is the 'channel of commerce,'—not the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation,—upon which each nation or State demands the right to move its products without any interference from the State or nation occupying the opposite shore. So important has the right ever been deemed, it is thought to be embraced in all treaties, cessions, ordinances, statutes

and constitutions made, enacted or adopted in regard to the Mississippi river since the Federal government was organized. It was the great desire to secure this important privilege that gave rise to all the efforts on the part of the general government to obtain the control of the Mississippi river from its source to that point where it empties into the gulf and connects with the sea."

This case, then, decides that the boundary line between the States of Iowa and Illinois is the middle of the navigable channel of the river, along which vessels in carrying trade can and usually do pass—the channel of commerce.

The court decides that the middle of the river in the Enabling Act means the middle of the main channel, and that the main channel of the river is the space in which vessels can and usually do pass, and does not include the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation, but is the channel of commerce; and, after so defining the main channel, the court then says:

"This court has no hesitation in coming to the conclusion that all of that part of the bridge and its approaches that lies east of the main line of the channel of the river, is within the jurisdiction of the State of Illinois for the purposes of the State and local taxation."

In *St. Louis* v. *Rutz*, 138 U. S. 226, the court says (p. 248):

"The Enabling Act of April 18, 1818, 3 Stat. 429, Sec. 2, under which Illinois was organized as a State and admitted into the Union, made 'the middle of the Mississippi river' the western boundary of the State. The Enabling Act of March 6, 1820, 3 Stat. Sec. 2, under which Missouri was organized as a State and admitted into the Union, made the 'middle of the main channel of the Mississippi river' the eastern boundary of Missouri, so far as its boundary

line was coterminous with the western boundary of Illinois. It has been held by the Supreme Court of Illinois, *Buttenuth* v. *St. Louis Bridge Co.*, 123 Illinois 535, that these two Enabling Acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the 'middle of the main channel of the Mississippi river.' The 'middle of the main channel of the Mississippi' has been constantly treated as the eastern boundary of the State of Missouri. *Jones* v. *Soulard*, 24 How. 41: *The Schools* v. *Risley*, 10 Wall 91."

Therefore, the boundary line between Illinois and Iowa is the *middle of the main channel* of the Mississippi river. Is the main channel of the river the same thing as the river from shore to shore? The authorities show clearly the distinction between the two.

Angell on watercourses says:

"In ascertaining the thread of the river it would be proper to take the middle line between the shores on each side without regard to the *channel* or lowest and deepest part of the stream."

This clearly shows the distinction between the channel and the river from shore to shore. Again from the same author:

"It is apparent that the rights of riparian proprietors on opposite banks of the stream do not depend upon and are not affected by the *locality of the channel* through or along which the larger or even the chief and principal part of the water flows."

This quotation also shows the distinction between the channel and the bed of the river from shore to shore.

There is but one point in controversy in this case, and that we believe has been presented at sufficient length by both parties. It is important that it shall be determined, to the end that limits of the taxing power as well as the

general jurisdiction of each of these States shall be defined. We join with counsel for complainant in the request that a commission be appointed to establish and mark the common boundary line of these two States on the several bridges crossing the Mississippi river between them.

Respectfully submitted.

GEORGE HUNT.

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